

IN THE SUPREME COURT OF MISSOURI

EASTERN MISSOURI COALITION)
OF POLICE, FRATERNAL ORDER)
OF POLICE, LODGE 15,)

Plaintiff-Respondent,)

vs.)

Appeal No. SC91736

CITY OF CHESTERFIELD,)

Defendant-Appellant.)

Appeal from the Circuit Court of St. Louis County
Twenty-First Judicial Circuit, Division No. 20
Honorable Colleen Dolan, Judge
Circuit Court Cause No. 09SL-CC00023
Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED95366

APPELLANT’S SUBSTITUTE BRIEF

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(b) FOP failed to prove that more than three individuals within the purported bargaining unit of seventy-eight police officers and sergeants signed “representation interest cards” allowing FOP to represent them in any capacity, let alone as plaintiffs here, inasmuch as all the other purported signatures on the cards were unauthenticated and therefore inadmissible in evidence.

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JURISDICTIONAL STATEMENT

This is an appeal from a declaratory judgment and mandatory injunction, as set out and decreed in the Findings of Fact, Conclusions of Law and Judgment of the Circuit Court of St. Louis County, Missouri, dated July 16, 2010, following a non-jury trial. The judgment ordered the Appellant City of Chesterfield to “establish a framework for collective bargaining” of a specified form, and to engage in collective bargaining with a specified bargaining unit of police officers and sergeants represented by the Respondent police union. Appellant timely filed its Notice of Appeal herein on August 13 and 16, 2010.

This case did not involve any issues within the exclusive appellate jurisdiction of the Supreme Court of Missouri, and was therefore within the general appellate jurisdiction of the Missouri Court of Appeals, pursuant to Article 5, Section 3 of the Constitution of Missouri. The Court of Appeals for the Eastern District of Missouri had territorial jurisdiction of the appeal pursuant to Section 477.050, R.S.Mo. However, on May 3, 2011, after the parties had completed their briefing and oral argument of the case, the Court of Appeals for the Eastern District issued an opinion transferring the appeal to the Supreme Court of Missouri pursuant to Missouri Supreme Court Rule 83.02.

STATEMENT OF FACTS

Plaintiff-Respondent, Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15, hereinafter referred to as “Respondent” or “FOP,” is a public-employee labor union organized as a Missouri corporation. (Trial Transcript, page 27 [“Tr. 27”].) Defendant-Appellant, the City of Chesterfield, Missouri, hereinafter referred to as “Appellant” or “the City,” is a city of the third class. (Tr. 111.) The City operates a merit system police department pursuant to Missouri law, including Sections 85.541-85.571, R.S.Mo. (Tr. 114-115, Exhibit N.) As required under the statutes governing its merit system police department, the City has a six-member police personnel board which administers the hiring, personnel and disciplinary process for police officers. (Tr. 137-138.)

The Chesterfield Police Officers Association is an organization founded in 1996 whose purpose is to represent interests of the City’s police officers. As of the time of trial in this case, all of its 64 members were also members of FOP. (Tr. 43-44.) The City has never recognized FOP, nor any other labor organization including the Chesterfield Police Officers Association, as the exclusive collective bargaining agent for any of the members of its police department of any rank. (Tr. 22, 118, 124, 148-150.) Neither the Mayor of the City, nor any members of the City Council, nor any residents of the City of Chesterfield, have ever asked for the City to establish an ordinance or framework for collective bargaining with any of the employees of its police department, and the City has not done so. (Tr. 120, 125-126, 129, 147-149, 162, 167-168, 176-177.)

No police officers or sergeants of the City of Chesterfield have asked the City

Administrator or the Mayor for collective bargaining, nor requested it at City Council meetings. (Tr. 117, 158.) However, during July and August 2007, signatures were affixed to “Fraternal Order of Police, Lodge 15 Representation Interest Card” forms in the names of fifty-three police officers and sergeants employed by the City, including four officers who had the title of “Detective.” Each of those signed forms--which FOP kept in its files and offered in evidence collectively as Exhibit 2 in this case, with the trial court taking under submission the issue of whether to admit the exhibit--contained the following text:

“I, (Print Your Name) [name], support the certification of the Fraternal Order of Police, Lodge 15 as my exclusive representative in collective bargaining with my employer identified below. I, the undersigned, do hereby assign to identify [*sic*] labor organization, Fraternal Order of Police, Lodge 15 and their [*sic*] agents and representatives to act as my representative and exclusive bargaining agent for the purpose of collective bargaining, including bargaining with regard to wages, hours and working conditions. I have completed this authorization of my own free will.”

(Tr. 48-49, 60-61, 102-106.) During February and March 2009, signatures were affixed to additional “Fraternal Order of Police, Lodge 15 Representation Interest Card” forms in the names of sixty-eight police officers and sergeants employed by the City. Each of those signed forms--which FOP kept in its files and offered in evidence collectively as Exhibit 3, with the trial court again taking under submission the issue of whether to admit the exhibit--contained the same text as those in Exhibit 2. (Tr. 49-50, 60-61, 102-106.)

In the trial court, only three of the signatures on the “Fraternal Order of Police, Lodge 15 Representation Interest Card” forms in Exhibit 2 and three of the signatures on the forms in Exhibit 3 were identified in evidence by individual Chesterfield police officers who claimed to have signed them: Sergeant David Weiss (Tr. 64-67, Exhibits 15 and 16), Officer Laura Obermeyer (Tr. 83-87, Exhibits 13 and 14), and Officer James Carroll (Tr. 101). Officer Carroll testified that he and others had obtained the signed representation interest card forms in Exhibits 2 and 3 from other Chesterfield police officers on behalf of FOP, and that “a large amount of them”--possibly, although he was “not absolutely positively sure,” a “majority”--were signed in his presence. (Tr. 46-51.) Sergeant Weiss and Officer Obermeyer each testified that they did not remember the identity of the person or persons who obtained the signed cards from them. (Tr. 64-67, 83-87.)

On September 5, 2007, Gregory Kloeppe, as legal counsel for FOP, sent a letter to the City’s Police Chief, Ray Johnson, with similar letters to Appellant’s Mayor, City Administrator, and members of the City Council. (Tr. 14-15, Exhibits 4, 5, and 6.) The letter stated, in pertinent part, that FOP “seeks voluntary recognition of Lodge 15 as the exclusive bargaining representative” for the Chesterfield Police Department’s police officers and sergeants, and claimed both that “the Bargaining Unit members have overwhelmingly chosen Lodge 15 to be their exclusive bargaining representative” and that “Lodge 15 already represents numerous officers of the City of Chesterfield in a variety of matters.” The letter added that FOP was “prepared to file a petition with the State of Missouri to become the exclusive bargaining representative in the City of Chesterfield.”

However, Mr. Kloeppe's letter of September 5, 2007 made no mention of the July and August 2007 representation interest card forms, and provided no other proof of its assertion that the police officers and sergeants had chosen FOP to represent them. There is no evidence that a "petition" was ever "filed" with the State of Missouri or any agency thereof, at any time prior to this lawsuit, seeking to establish FOP as the exclusive bargaining representative for any of the City's employees, as mentioned in the letter. In fact, FOP's President, David Owens, testified that it had not filed such a petition. (Tr. 33.)

After the City's officials received the letter of September 5, 2007, the City Council designated the City Administrator, the City Attorney, and Mr. Michael Harris (retained counsel to the City on certain labor relations issues), to act as the City's collective bargaining unit to deal with requests for collective bargaining in regard to the employees of the Police Department. (Tr. 125-126, 164.) On October 3, 2007, Appellant's City Attorney sent a letter to Mr. Kloeppe (Tr. 17, Exhibit 7), stating in pertinent part that "The City of Chesterfield respectfully declines to voluntarily recognize" FOP "as the exclusive bargaining representative for its police officers and sergeants. It is the position of the City of Chesterfield that all matters relating to third-party representation of employees of the City be processed in accordance with applicable regulatory guidelines and procedures."

On October 4, 2007, Mr. Kloeppe sent another letter to Appellant's City Attorney. (Tr. 18, Exhibit 8.) This letter stated, in pertinent part, that the procedures of the Missouri Department of Labor and Industrial Relations allowed "voluntary recognition and the avoidance of unnecessary and disruptive elections and costly litigation." The letter requested

the City Attorney to “inform me within ten (10) days as to whether or not the City intends to establish a framework for recognition of FOP Lodge 15 as the bargaining representative for the City’s Police Officers and Sergeants.” The letter of October 4, 2007 also reiterated FOP’s earlier claim that “an overwhelming majority of the bargaining unit of police officers and sergeants have chosen FOP Lodge 15 as their exclusive bargaining representative”, but made no mention of the representation interest card forms and provided no other proof of its assertion that the police officers and sergeants had chosen FOP to represent them.

On October 17, 2007, Mr. Kloeppe sent a third letter to the City Attorney (Tr. 18-19, Exhibit 9), stating in pertinent part that FOP was “specifically requesting that the City of Chesterfield establish a framework for police officers to bargain collectively through representatives of their own choosing.” The October 17, 2007 letter referred to the Supreme Court of Missouri’s opinion in *Independence-National Education Association v. Independence School District*, 223 S.W.3d 131 (Mo. banc 2007), and claimed that “it is the City’s duty to establish the framework for police officers to choose their union representative for purposes of collective bargaining.” In this letter, Mr. Kloeppe also repeated his earlier request for the City Attorney to “inform me within ten (10) days as to whether or not the City intends to establish a framework for recognition of FOP Lodge 15 as the bargaining representative for the City’s Police Officers and Sergeants.” He added that FOP was “disappointed that the City or Chesterfield refused to voluntarily recognize FOP Lodge 15 as the bargaining representative chosen by the City’s Police Officers and Sergeants,” but made no mention of the representation interest card forms, and provided no other proof of the

assertion that the police officers and sergeants had chosen FOP to represent them.

On October 31, 2007, the City Attorney sent a reply letter to Mr. Kloepfel (Tr. 19, Exhibit 10), disagreeing with Mr. Kloepfel's assertion in the letter of October 17, 2007 that the City "has a duty to establish a framework for police officers to choose their union representative for purposes of collective bargaining." The reply letter further stated, in pertinent part, both that the word "role"--as used in the *Independence* case *dictum* to which the letter of October 17, 2007 had referred--was not equivalent to a "duty" on the part of the City; and that nothing in the *Independence* decision "requires or mandates that Chesterfield voluntarily recognize FOP Lodge 15 as the bargaining unit" for the City's police officers and sergeants. The City, acting in its legislative capacity, "declines, at this time, to establish a framework for recognition of FOP Lodge 15 as the bargaining representative for the City's Police Officer and Sergeants. Should the general assembly fail to act on this matter or should different facts and circumstances present themselves to the City of Chesterfield, the City Council might certainly choose to act, at a future point in time, on this matter."

A year later, on November 18, 2008, Mr. Kloepfel sent another letter to the City Attorney (Tr. 19-20, Exhibit 11), stating in pertinent part that, since the City Attorney's letter of October 31, 2007, "the City of Chesterfield has taken no action to establish a framework for collective bargaining for its police officers" and that "As part of the recognition process for police officers, Missouri law requires that a framework for collective bargaining be established by the City." Mr. Kloepfel claimed that such a "framework" would "need to address" certain specific provisions, including "the process for recognition, method of

requesting and holding bargaining sessions and method of adoption, modification or amendment to agreements from bargaining sessions. The framework must include the ability of employees to meet, confer and discuss proposals and for the results of such discussion to be put into writing and presented to the ‘appropriate administrative, legislative or other governing body in the form of an ordinance, resolution, bill or other form required for adoption, modification or rejection.’” Again, he supplied no proof that any police officers or sergeants had actually authorized FOP to represent them. The City Attorney replied on December 8, 2008 (Tr. 20-21, Exhibit 12), by a letter stating in pertinent part that “the City of Chesterfield considers that there has been no change of circumstances requiring it to alter the position taken in our October 31, 2007 letter” or to act upon FOP’s request.

FOP filed suit against the City on January 5, 2009. (Legal File, pages 1, 6 [“L.F. 1, 6”].) Its Petition (L.F. 6-16), as amended (L.F. 33-35), set out a single count, entitled “Declaratory Judgment Under Section 527 RSMO. et seq.”, and prayed, in pertinent part:

“that this Court conduct its own hearing to review the issues and determine the facts herein, including, but not limited to: (i) a sufficient showing of interest by the police officers and sergeants of Defendant City to have FOP Lodge 15 as their exclusive bargaining representative; (ii) the appropriate scope of the bargaining unit which would include police officers and sergeants; (iii) the election process for certifying FOP Lodge 15 as the exclusive bargaining unit for the City’s police officers and sergeants, including: (a) the date, time and place of election and (b) the procedures for holding an election; (iv) the

establishment of a collective bargaining framework, including procedures for the meet and confer process; and (v) any and all other issues that this Court deems necessary to determine in this case and in its discretion.” (L.F. 10-11.)

Not one individual Chesterfield police officer or sergeant out of the seventy-eight employed by the City (Tr. 133) is a party plaintiff in this case, and no individual Chesterfield police officer or sergeant has moved for joinder as a party or for intervention as a party or *amicus curiae*. (L.F. 1-5.) The City moved to dismiss the action for failure to state a claim upon which relief can be granted, and other grounds including lack of ripeness and standing, noting that FOP “has not been established as the exclusive bargaining representative of any employees” of the City pursuant to Section 105.525, R.S.Mo., or otherwise. (L.F. 29-30.) In an order dated April 22, 2009, the trial court found the City was “correct that [FOP’s] allegation that it is, or should be, the exclusive bargaining agent for the police officers of the City of Chesterfield is not self-proving”, and that the burden was on FOP “to prove its allegations at trial or hearing”, but denied the motion to dismiss. (L.F. 31-32.)

The case finally came to trial on February 8, 2010. (L.F. 3-4.) At the trial, FOP’s President testified that the City has not to date “created a framework” for collective bargaining with FOP, nor held an election to determine whether the police officers and sergeants of the City of Chesterfield desired to be represented by FOP, nor requested that FOP produce their signed representation cards, nor “created a framework” for collective bargaining with regard to its police officers and sergeants, nor bargained with FOP. (Tr. 22-23.) He further testified that he was requesting the trial court both to determine that FOP “has

sufficient showing of interest by police officers and sergeants from the City of Chesterfield to name” FOP as their exclusive collective bargaining representative (Tr. 23-24), and “to adopt the process for recognition of collective bargaining representative, including the name, time, date, and place to hold an election and the procedures for the collective bargaining process” as well as “to order the establishment of a collective bargaining framework, including procedures for the meeting process.” (Tr. 24.)

FOP’s President further testified (pursuant to an offer of proof by the City, after the trial court sustained an objection, based on relevancy, to the line of questioning pursued by the City’s counsel) that the City’s refusal to establish a “framework for collective bargaining” has not caused financial harm to FOP. (Tr. 29-30.) He also testified (pursuant to an offer of proof by the City, after the trial court sustained an objection, based on relevancy, to the line of questioning pursued by the City’s counsel) that the City and its statewide organization of municipalities have supported proposed legislation in the General Assembly that would allow police officers to seek recognition of their union through the State Board of Mediation. (Tr. 30-33, 171-172, Exhibits P, Q, R, S, T, U, V, and W.)

There was evidence that FOP has participated in the municipal political process by endorsing candidates for election to the Chesterfield City Council, after inquiring of them whether they would support collective bargaining rights for police officers. (Tr. 25-27, 173-174.) FOP’s members have attended meetings of the Chesterfield City Council to discuss topics with the City Council, including the pension plan. (Tr. 38, 117-118.) However, FOP’s President testified (pursuant to an offer of proof by the City, after the trial court sustained an

objection, based on relevancy, to the line of questioning pursued by the City's counsel) that FOP has not appeared at any meetings of the City Council "to ask the City of Chesterfield to pass a framework for collective bargaining." (Tr. 36.)

The City's Police Chief meets with the police officers on a regular basis and discusses with them whatever agenda the officers set, and he testified (pursuant to an offer of proof by the City, after the trial court sustained an objection, based on relevancy, to the line of questioning pursued by the City's counsel) that they have not expressed to him an interest or desire for collective bargaining. (Tr. 146-147.) The City Administrator and Police Chief have never seen the representation cards which were allegedly signed by members of the City's Police Department. (Tr. 117, 148.) However, police officers of the City have availed themselves, on occasion, of their rights to appeal employment decisions to the City's police personnel board. (Tr. 119.)

The City's Police Chief testified that it is the duty of the City's police sergeants to supervise the police officers who "perform the basic police functions" and, in doing so, the sergeants "correct inappropriate behavior through the disciplinary process, they evaluate the officers, assigning them a numerical score based on their performance." The performance evaluations occur annually. (Tr. 134-136.) The City Administrator and Police Chief testified, respectively (pursuant to offers of proof by the City, after the trial court sustained objections to the line of questioning pursued by the City's counsel), that they believed it would be a conflict of interest, and contrary to the good order and discipline of the Police Department, for police supervisory employees to be in the same bargaining unit with the officers whom

they supervise. (Tr. 127-128, 145-146.)

The City Administrator also testified (pursuant to an offer of proof by the City, after the Court sustained an objection, based on relevancy, to the line of questioning pursued by the City's counsel) that in his twenty years of experience with the City, including its litigation, no court has ever ordered the City to pass a specific ordinance as the result of a case. (Tr. 126-127.)

Pursuant to Missouri Supreme Court Rule 73.01, the City requested the trial court to make specific findings of fact and conclusions of law. (L.F. 36.) On July 16, 2010, the trial court finally entered its Findings of Fact, Conclusions of Law and Judgment. (L.F. 38-50.) Overruling the City's objections (at Tr. 48, 50, 60-61, 102-106) to the admission of the representation interest cards in evidence, and referring to the fact that "two police officers and one sergeant testified to the authenticity of their 2009 signatures (L.F. 42), the trial court found that "fifty-three (53) police officers and sergeants employed by the City's police department signed" the cards in July and August 2007 (L.F. 39), and sixty-eight "signed or re-signed" the cards in February and March 2009 (L.F. 41). The trial court further found that this "demonstrated an overwhelming majority of the City's police officers and sergeants support FOP Lodge 15 to act as their exclusive representative for collective bargaining" (L.F. 39), but the City "has not voluntarily recognized FOP Lodge 15 as the exclusive bargaining representative for police officers and sergeants" and "has not created a framework for collective bargaining for its police officers and sergeants." (L.F. 42.)

The trial court then set out extensive conclusions of law, including:

--“FOP Lodge 15 has standing to sue on behalf of its members through the doctrine of associational standing.” (L.F. 42.)

--“The City has a duty to establish a framework for collective bargaining for its police officers and sergeants.” (L.F. 45.) “By failing to do so, the City has deprived its employees of their rights under Article 1, Section 29 [of the Constitution of Missouri] to bargain collectively through representatives of their own choosing.” (L.F. 47.)

--“The separation of powers doctrine does not restrict the city from establishing a framework for collective bargaining for its police officers and sergeants.” (L.F. 47.)

--“The City’s refusal to voluntarily recognize FOP Lodge 15 as the exclusive collective bargaining representative for the City’s police officers and sergeants, refusal to hold a certification election, and refusal to adopt a framework for collective bargaining has violated the constitutional rights of the City’s police officers and sergeants guaranteed in Article 1, Section 29.” (L.F. 48.)

--“The appropriate scope of the bargaining unit includes the city’s police officers and sergeants ... since they share a clear and identifiable community of interest”. (L.F. 48-50.)

The trial court then entered the following detailed provisions in its Judgment (L.F. 50):

“Judgment shall be entered in favor of Plaintiff [FOP]. Defendant [the City] shall expeditiously establish a framework for collective bargaining which will include: the scope of an appropriate bargaining unit which will include police officers and sergeants, procedures for the election process certifying FOP

Lodge 15 as the exclusive bargaining unit for the City's police officers and sergeants, including the date, time, and place of election, the procedures for holding an election, and the procedures for the meet and confer process.”

The City timely filed its Notice of Appeal (L.F. 4, 51-52) and accompanying Civil Case Information Form (L.F. 53-54) on August 13 and 16, 2010. The parties briefed and argued the case in the Court of Appeals for the Eastern District, with the City raising the three issues which are set out, in identical form, by its Points Relied On herein.

On May 3, 2011, a panel of three judges of the Court of Appeals for the Eastern District issued an opinion transferring the case to the Supreme Court of Missouri, pursuant to Missouri Supreme Court Rule 83.02. The panel stated unanimously that “We would affirm in part and amend [the trial court’s judgment] in part. However, due to the general interest and importance of the issues presented, we transfer this case to the Missouri Supreme Court” (Slip Opinion, at page 1). In the Conclusion to their opinion, the three judges of the Court of Appeals summarized their views on the issues of the case by stating (Slip Opinion, at pages 9-10):

“In our view the trial court did not err in determining that Union [*i.e.*, FOP] has standing or in ordering City to create a framework for collective bargaining, but we would conclude that the trial court erred in specifically directing City to designate Union as the exclusive bargaining unit at this stage of the process. We would amend the trial court’s judgment to eliminate that directive but otherwise affirm. However, given the general interest and

importance of the questions presented, we transfer this case to our Supreme Court pursuant to Rule 83.02.”

POINTS RELIED ON

I

The trial court erred in declaring that Appellant City of Chesterfield unlawfully refused to “adopt a framework for collective bargaining” and to hold a union certification election and recognize Respondent FOP as the exclusive collective bargaining agent for a bargaining unit consisting of the City’s police officers and sergeants, because the City has no legally enforceable duty under Article 1, Section 29 of the Constitution of Missouri to do so, in that the constitutional provision does not create any such affirmative duties for municipalities.

Quinn v. Buchanan, 298 S.W.2d 413 (Mo. banc 1957)

Anderson v. City of Olivette, 518 S.W.2d 34 (Mo. 1975)

City of Kansas City v. Jordan, 174 S.W.3d 25 (Mo.App.W.D. 2005)

Missouri Soybean Association v. Missouri Clean Water Commission, 102 S.W.3d 10
(Mo. banc 2003)

Constitution of Missouri, Article 1, Section 29

II

The trial court erred in entertaining Respondent FOP's claims for declaratory and injunctive relief, because FOP lacked standing to sue, in that:

(a) Article 1, Section 29 of the Constitution of Missouri protects the rights of individuals but not of labor unions, and no individuals were parties to the action claiming a deprivation of their personal rights to collective bargaining.

(b) FOP failed to prove that more than three individuals within the purported bargaining unit of seventy-eight police officers and sergeants signed "representation interest cards" allowing FOP to represent them in any capacity, let alone as plaintiffs here, inasmuch as all the other purported signatures on the cards were unauthenticated and therefore inadmissible in evidence.

Quinn v. Buchanan, 298 S.W.2d 413 (Mo. banc 1957)

Cheatham v. Walsh, 669 S.W.2d 587 (Mo. banc 1984)

Wrinkle v. International Union of Operating Engineers, Local 2, AFL-CIO,

867 S.W.2d 633 (Mo.App.S.D. 1993)

C & W Asset Acquisition, Inc. v. Somogyi, 136 S.W.3d 134 (Mo.App.S.D. 2004)

Constitution of Missouri, Article 1, Section 29

III

The trial court erred in issuing mandatory relief compelling Appellant City of Chesterfield to “adopt a framework for collective bargaining,” to hold a union certification election, and to recognize Respondent FOP as the exclusive collective bargaining agent for a bargaining unit consisting of the City’s police officers and sergeants, because courts lack the power to order a municipality to do so, in that the separation of powers doctrine under Article 2, Section 1 of the Constitution of Missouri, and other binding precedent under Article 1, Section 29 of the Constitution of Missouri and elsewhere, forbid such relief.

State ex rel. Spink v. Kemp, 283 S.W.2d 502 (Mo. banc 1955)

Quinn v. Buchanan, 298 S.W.2d 413 (Mo. banc 1957)

Lenette Realty & Investment Company v. City of Chesterfield,

35 S.W.3d 399 (Mo.App.E.D. 2000)

Wrinkle v. International Union of Operating Engineers, Local 2, AFL-CIO,

867 S.W.2d 633 (Mo.App.S.D. 1993)

Constitution of Missouri, Article 1, Section 29

Constitution of Missouri, Article 2, Section 1

ARGUMENT

I

The trial court erred in declaring that Appellant City of Chesterfield unlawfully refused to “adopt a framework for collective bargaining” and to hold a union certification election and recognize Respondent FOP as the exclusive collective bargaining agent for a bargaining unit consisting of the City’s police officers and sergeants, because the City has no legally enforceable duty under Article 1, Section 29 of the Constitution of Missouri to do so, in that the constitutional provision does not create any such affirmative duties for municipalities.

The Applicable Standard of Review: The standards of *Murphy v. Carron*, 536 S.W.2d 30, at 32 (Mo. banc 1976), apply on review of a court-tried case under Missouri Supreme Court Rule 73.01, “as in suits of an equitable nature.” The basic rule is that “the decree or judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” However, “In reviewing a particular issue that is contested, the nature of the appellate court’s review is directed by whether the matter contested is a question of fact or law”. Questions of law, including those of constitutional interpretation and application, “are reviewed de novo,” although if the facts relevant to an issue are contested, “the reviewing court defers to the trial court’s assessment of the evidence.” *White v. Director of Revenue*, 321 S.W.3d 298, at 308, 310 (Mo. banc 2010).

This case is an action for declaratory judgment (L.F. 14-16), and as such it is

essentially equitable in nature: “An action pursuant to the Declaratory Judgment Act is *sui generis*, neither legal nor equitable, but its historical affinity is equitable and such actions are governed by equitable principles.” *Preferred Physicians Mutual Management Group, Inc. v. Preferred Physicians Mutual Risk Retention Group*, 916 S.W.2d 821, at 823 (Mo.App.W.D. 1995); *Turnbull v. Car Wash Specialties, LLC*, 272 S.W.3d 871, at 873 (Mo.App.E.D. 2008).

The Substantive Grounds for Reversal: Article 1, Section 29 of the Constitution of Missouri provides “That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.” This constitutional provision sets out a right of individuals--but not a right which labor unions like FOP can enforce through litigation on behalf of their members, let alone on behalf of any other employees--nor a right of employees or their unions to compel any particular action by an employer--nor a right which for which courts are empowered to fashion any equitable remedies as they please--nor a duty on the part of municipalities such as the City of Chesterfield to take any particular action with regard to their employees, or with regard to a union asserting the purported right to represent those employees.

In *Quinn v. Buchanan*, 298 S.W.2d 413, at 418-419 (Mo. banc 1957), this Court explained the actual scope of the constitutional provision as follows:

“It should also be pointed out that Sec. 29, Art. I is not a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations, as plaintiffs seem to claim. ... This provision is a declaration of

a fundamental right of individuals. It is self-executing to the extent that all provisions of the Bill of Rights are self-executing, namely: Any governmental action in violation of the declared right is void. As between individuals, because it declares a right the violation of which surely is a legal wrong, there is available every appropriate remedy to redress or prevent violation of this right. However, the constitutional provision provides for no required affirmative duties concerning this right and these remedies can only apply to their violation. ... Thus implementation of the right to require any affirmative duties of an employer concerning it is a matter for the Legislature.”

This Court therefore specifically held, *id.* at 298 S.W.2d 419, that the employee plaintiffs were not entitled to mandatory relief, nor to an order requiring their employer “to recognize and bargain with the union. The relief to which they are entitled is to have the rights of those employees, who voluntarily choose to organize with them for the purpose of collective bargaining, protected from coercion.”

These principles from *Quinn v. Buchanan* remain the governing and controlling law. They are further supported by the intended and understood definition of the term “collective bargaining,” as discussed by the framers of the constitutional provision during the debates over the language which was eventually adopted as Article 1, Section 29. During that debate, the provision’s leading proponent, Mr. Reuben Wood of Greene County, acknowledged that the concept of “collective bargaining” may have several meanings, but that it was not the intention of the constitutional language to define “collective bargaining” as exclusive or

closed-shop bargaining, whereby a municipal employee would be required to be a member of a particular union in order to work for the city--“that would require that a man could belong to a union before he could go to work for the city, accept employment.” *Debates of the 1943-1944 Constitutional Convention of Missouri*, Volume 9, page 2552, at <http://digital.library.umsystem.edu>. The idea was merely to allow cities and their employees the opportunity “to meet and sit down and work out their problems”, and not to “deprive” them of the ability to do so. *Id.*

Independence-National Education Association v. Independence School District, 223 S.W.3d 131 (Mo. banc 2007), the case on which FOP has attempted to rely here, does not overrule or even cite *Quinn*. The *Independence* case therefore gives FOP neither the right to maintain this action, nor the right to obtain the relief that it sought and the trial court mistakenly and improperly granted, without even mentioning the *Quinn* case in its Findings of Fact, Conclusions of Law and Judgment (L.F. 38-50) despite the City’s reliance upon *Quinn* in the briefing and submission of the City’s own proposed findings and conclusions.

Independence merely holds that Article 1, Section 29 protects the collective bargaining rights of individual public employees to the same extent as private sector employees, and permits the enforcement of existing public employee union contracts with political subdivisions. But *Independence* is clearly distinguishable from the present case, because it dealt with a governmental employer (a school district) which--unlike the City of Chesterfield--had *already* voluntarily recognized and entered into collective bargaining and an agreement with the union plaintiffs.

The portions of the *Independence* opinion on which FOP relies, in the present context of an unrecognized union and bargaining unit, were merely *dicta*. As such, they were not binding precedent for the trial court, nor for that matter this Court, to follow in deciding this case. See *State ex rel. Anderson v. Hostetter*, 140 S.W.2d 21, at 24 (Mo. 1940); *State v. Burgin*, 203 S.W.3d 713, at 717 (Mo.App.E.D. 2006). “*Obiter dictum* is ‘a judicial comment made while delivering a judicial opinion, but one that is not necessary to the decision in the case.’ ... *Obiter dictum* is not binding on lower courts.” *Id.*

The *dicta* from the *Independence* case upon which FOP and the trial court relied were a small and insignificant part of one sentence of a lengthy opinion. Seeking (a) to distinguish an earlier case that had invoked the “nondelegation doctrine” as a ground for disallowing collective bargaining by public employees altogether, and (b) to eliminate any implication that the omission of teachers from the Public Sector Labor Law, Sections 105.500-105.530, R.S.Mo., controlled the outcome of the case, the *Independence* majority referred, rather unclearly, to the “role” of public bodies “to set the framework” for public employees to bargain collectively. However, the actual context of those words (*supra* at 223 S.W.3d 136), on which FOP has attempted to rest its case, was as follows:

“To be consistent with article I, section 29, the statute’s exclusion of teachers cannot be read to preclude teachers from bargaining collectively. Rather, the public sector labor law is read to provide procedures for the exercise of this right for those occupations included, but not to preclude omitted occupational groups from the exercise of the right to bargain collectively, because all

employees have that right under article I, section 29. Instead of invalidating the public sector labor law to the extent that it excludes teachers, this Court’s reading of the statute recognizes the role of the general assembly, or in this case, the school district - in the absence of a statute covering teachers - to set the framework for these public employees to bargain collectively through representatives of their own choosing. In this regard, it is noteworthy that prior to this controversy, the district in effect recognized the teachers’ right to bargain collectively through its ‘discussion procedure.’”

The actual holdings of the *Independence* case were described by this Court’s opinion quite differently, as follows, *id.* at 223 S.W.3d 133:

“This case raises two issues:

1. Does the ‘right to organize and bargain collectively’ apply to public employees as well as private-sector employees?

2. If the public employer, in this case the school district, negotiates an agreement with its employee groups, may the public employer unilaterally impose a new employment agreement that contradicts the terms of the agreements then in effect?

The answer to the first question, which follows the plain words of the constitution, is yes.

The answer to the second question – with the understanding that the law does not require the school district as public employer to reach agreements with its

employee associations – is no.”

Those are the only determinations of the *Independence* decision which actually constitute binding precedent for any subsequent litigation--including this case.

What the opinion in *Independence* said in passing about the “role” of a school district, “in the absence of a statute covering teachers”, to “set the framework” for collective bargaining with them--as had occurred voluntarily and without challenge in the circumstances of that case--does not control the situation of the City and its police officers and sergeants here. The *Independence dicta* neither said nor meant that the City, or any other political subdivision, has a “duty” to “establish a framework” of any particular kind, outside the scope of the Public Sector Labor Law, Sections 105.500-105.530, R.S.Mo., and without any other statutory authority. Under *Quinn, supra*, a municipal employer, like any other employer, can have no such “duty.” The holding of *Quinn*, and not the ambiguous and unnecessary *dicta* of *Independence*, should end the matter.¹

¹ The Court of Appeals’s opinion failed to give *Quinn* its due as a binding precedent on the issue of the City’s purported (but actually nonexistent) “duty” to create a collective bargaining framework; and indeed it seems to have adopted FOP’s incorrect argument that *Independence* implicitly overruled *Quinn*, or at least made that precedent “factually inapposite” and “inapplicable” (Slip Opinion, at page 5). Seeking to distinguish *Quinn* because it involved a private rather than a public employer, the opinion incorrectly described *Quinn* as holding “the constitutional right of collective bargaining could not be denied by the

In any event, there is no statutory authority in the Public Sector Labor Law or elsewhere for cities like Chesterfield to “set the framework” for collective bargaining with their police employees as FOP requested in this case. Cities have only those legislative powers which have actually been conferred upon them by statute; and “[a]ny reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of nondelegation.” *Anderson v. City of Olivette*, 518 S.W.2d 34, at 39 (Mo. 1975).

“A city is a creature of the state and, as such, has no inherent police power. ... The only police power a city has is that conferred by the state.” *City of Kansas City v. Jordan*, 174 S.W.3d 25 (Mo.App.W.D. 2005). The Missouri legislature has already indicated, in Sections 85.541-85.571, R.S.Mo., how third class cities with a merit-based police force are to interact with their police officers. Without any other independent, plenary power to act in a manner not authorized by statute, the City’s “role” and capacity to “set the framework” for collective bargaining are no more than a theoretical abstraction, but not a legal reality. And as

government. Quinn at 417.” (Slip Opinion, at page 6.) That phrase is not a quotation or an accurate characterization of *Quinn’s dicta* at the cited page; and it omits *Quinn’s* crucial, immediately following language that provisions in a constitutional bill of rights “do not, however, usually provide methods or remedies for their enforcement”. Yet the Court of Appeals cited *dicta* from *Independence* as if they were its actual holdings. Of course, under Missouri Supreme Court Rule 83.09, this case is to be “determined the same as on original appeal”, so the appellate court’s opinion has no controlling force here.

a matter of law, the trial court itself, and this Court, do not have the power to order any of the affirmative relief against the City that FOP requested, even if FOP had standing to request it.

Quinn, supra.

The City is a legislative branch entity which the courts cannot mandate or compel to act in a specific fashion, on their own motion or at the request of an adverse party, even if they find that the City has not complied with the law or that it has somehow acted incorrectly. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963); *Lenette Realty & Investment Company v. City of Chesterfield*, 35 S.W.3d 399 (Mo.App.E.D. 2000). The Court of Appeals seemed to recognize this principle--although, by endorsing some portions of the trial court's grant of affirmative relief, and asserting that the existence of municipal employees' constitutional right to collective bargaining somehow requires courts to recognize "a corresponding duty of City to facilitate the exercise of that right"--its observations (Slip Opinion, at page 9) were not consistent as a fully proper application of the *Lenette* rule.

As the City attempted to illustrate through the testimony of its City Administrator (Tr. 126-127), it is in fact unheard of for courts to issue the type of detailed, mandatory relief against legislative bodies that the Circuit Court of St. Louis County agreed to command, at FOP's urging, in this case. More specifically, neither the trial court nor this Court has the statutory or common law authority to determine the proper contours of a hitherto nonexistent bargaining unit, either procedurally or as a substantive matter, in an action brought by FOP. *Wrinkle v. International Union of Operating Engineers, Local 2, AFL-CIO*, 867 S.W.2d

633 (Mo.App.S.D. 1993), establishes that a group of public employees cannot simply assert they constitute a bargaining unit, with the status of exclusive bargaining representative automatically conferred upon their preferred union. They have “no legal right to declare themselves, alone, a bargaining unit (represented by the Union) which the City must recognize.” *Id.* at 638. The law is clear that determination of the appropriate scope and membership of a collective bargaining unit is an administrative task, not a judicial one. It requires “specialized knowledge which the courts lack.” *Parkway School District v. Parkway Association of Education*, 807 S.W.2d 63, at 69 (Mo. banc 1991). Thus, the trial court’s acquiescence in FOP’s claim that “the City’s police officers and sergeants comprise an appropriate bargaining unit” (L.F. 50)--despite the strong evidence to the contrary (Tr. 127-128, 134-136, 145-146)--had no foundation in fact, in labor law, or otherwise.

General equitable powers and the Declaratory Judgment Act, Sections 527.010-527.130, R.S.Mo., are not sufficient to justify the trial court’s issuance of sweeping mandatory relief in this case which is not otherwise authorized by law. The “authority of the courts of this State to render declaratory judgments must be used and operate within the limits of the constitutional powers and duties of the courts.” *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10, at 40 (Mo. banc 2003). The Declaratory Judgment Act “does not create any new or substantive rights” and “is not a substantive claim.” *Jackson v. Christian Salvason Holdings, Inc.*, 914 S.W.2d 878, at 882 (Mo.App.E.D. 1996). It is available only for matters “admitting of specific relief by way of a decree or judgment conclusive in character and determinative of the issues involved.” *City of*

Joplin v. Jasper County, 161 S.W.2d 411, at 413 (Mo. banc 1942).

While it might be argued that, given the employee rights created by Article 1, Section 29, the City must have some sort of implicit duty (albeit one not conferred by the terms of Sections 105.500-105.530, R.S.Mo., with regard to police employees) at least to meet and confer with representatives of employees' choosing--see *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, at 41 (Mo. 1969)--it is vital to note that no employee of the Chesterfield police department has ever actually asked to bargain collectively with the City. (Tr. 117, 158.) The City has only received four letters from counsel for FOP, demanding that the City set a framework for collective bargaining that involves an election and certification of FOP as the exclusive bargaining representative for all the police officers and sergeants in the supposed bargaining unit of FOP's choosing. Nothing in Article 1, Section 29 requires an election or exclusive representation of all employees by one union.

Why the City should have to set a framework for collective bargaining merely in response to letters from FOP is not clear. FOP does not need the City to crown FOP as the representative of any or all of its police employees. Indeed, FOP believes--albeit with scanty proof--that it already represents many of those employees. What the City needs, before it can or will collectively bargain (much less set up a formal framework for collective bargaining) are actual City employees who want to bargain collectively. If even a single employee were to come forward with such a request, then the City might well act to set a framework for collective bargaining, allowing for multiple collective bargaining representatives or individuals to represent themselves or other employees. But without an actual request from employees to

bargain collectively, this case will remain an academic exercise about what such a collective bargaining framework supposedly should contain, and whether the City has any duty to adopt such a framework after the mere receipt of letters from a union.

The City had no enforceable duty under Article 1, Section 29 to “set the framework” for collective bargaining with FOP as the exclusive representative of a bargaining unit of the City’s police officers and sergeants. The Circuit Court of St. Louis County had no power to order the City to do so. The judgment in this case should be reversed.

II

The trial court erred in entertaining Respondent FOP’s claims for declaratory and injunctive relief, because FOP lacked standing to sue, in that:

(a) Article 1, Section 29 of the Constitution of Missouri protects the rights of individuals but not of labor unions, and no individuals were parties to the action claiming a deprivation of their personal rights to collective bargaining.

(b) FOP failed to prove that more than three individuals within the purported bargaining unit of seventy-eight police officers and sergeants signed “representation interest cards” allowing FOP to represent them in any capacity, let alone as plaintiffs here, inasmuch as all the other purported signatures on the cards were unauthenticated and therefore inadmissible in evidence.

The Applicable Standard of Review: As in Point I above, the standards of *Murphy v. Carron*, *supra*, apply on review of a court-tried case under Missouri Rule of Civil Procedure 73.01, “as in suits of an equitable nature.” The “decree or judgment of the trial court will be

sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” However, “the nature of the appellate court’s review is directed by whether the matter contested is a question of fact or law.” Questions of law “are reviewed de novo,” although if the facts relevant to an issue are contested, “the reviewing court defers to the trial court’s assessment of the evidence.” *White v. Director of Revenue, supra*.

Standing to sue is an issue of law which can be considered at any time, even on appeal. *State ex rel. Mathewson v. Board of Election Commissioners*, 841 S.W.2d 633, at 634 (Mo. banc 1992). “The standard to be applied in determining whether a party has standing to bring a suit for declaratory and injunctive relief is whether the plaintiff has a legally protectable interest at stake.” *Cheatham v. Walsh*, 669 S.W.2d 587, at 589 (Mo.App.E.D. 1984). Both constitutional and evidentiary questions, to the extent they have been raised by the City and presented in this Point II with regard to the standing issue, are also reviewed *de novo* as matters of law on appeal. *White v. Director of Revenue, supra*; *Simpson v. Terminal Railroad Association of St. Louis*, 357 S.W.2d 65 (Mo. 1962).

The Substantive Grounds for Reversal:

(a) The Absence of Individual Plaintiffs. The Supreme Court of Missouri indicated in *Quinn v. Buchanan, supra*, that although employees who are members of a labor union may bring an action to vindicate their rights under Article 1, Section 29, the union itself may not do so. The Court stated that the proper parties plaintiff for such an action are the employees and other union members themselves, individually or as representatives of their

class. But in this case, there are no individual plaintiffs. It is not and does not purport to be a class action against the City. FOP has simply sued in its own name. The trial court nonetheless held that FOP “has standing to sue on behalf of its members through the doctrine of associational standing.” (L.F. 42.) That was error in the context of Article 1, Section 29, which is purely “a declaration of a fundamental right of individuals.” *Id.* at 298 S.W.2d 418.

A union might have “associational standing” to sue on behalf of its members for other causes of action or other types of relief, but not for the claims FOP has brought here. For example, in the *Independence* case, *supra* (where standing was not raised as an issue, and the case was tried on stipulated facts), teachers’ unions were permitted to sue to enforce their already existing contracts with a public school district. This case is quite different, and the standing question here involves two crucial threshold issues in addition to the question of whether under *Quinn*, *supra*, a union may serve as the sole plaintiff to vindicate its members’ alleged rights under Article 1, Section 29. The threshold issues are (1) whether FOP has proved the existence of a cognizable bargaining unit of the City’s police officers and sergeants, and (2) whether FOP actually represents the police employees in that supposed bargaining unit for whom it claims the right to sue. Only if FOP prevailed on those threshold issues could a court even address the criteria for associational standing--listed by the Court of Appeals as “(1) the members have standing to sue in their own right, (2) the interests that the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members” (Slip Opinion, at page

3)--and FOP still could not legally meet at least the third of those criteria.²

The Court of Appeals's opinion fundamentally mischaracterized the City's position on the standing issue, as well as on the continuing viability and application of *Quinn v. Buchanan* to this case. It incorrectly stated that the "City does not discuss Union's satisfaction of the foregoing elements, but rather argues as a preliminary matter that Union has failed to establish that it really exists and actually represents the employees whose rights it purports to assert." (Slip Opinion, at page 3.) At no time has the City attempted to make the claim that FOP does not even exist, which would have been an absurd argument; that characterization of the City's position is a straw man. But the City did indeed discuss, and demonstrate, FOP's failure to satisfy all the required elements for it to have standing.

The very essence of the City's Point Relied On with regard to the standing issue, and its arguments as to the two "threshold issues" (arguments repeated here verbatim from the City's original brief in the Court of Appeals), is that "no individuals were parties to the action claiming a deprivation of their personal rights to collective bargaining" and "FOP failed to prove that more than three individuals within the purported bargaining unit of

² The Court of Appeals disparaged the continuing viability of *Quinn* on the standing issue due to later decisions on "associational standing." (Slip Opinion, at page 3.) But those cases did not overrule *Quinn*, let alone establish a union's right to the type of relief FOP claims here under Article 1, Section 29, without the participation of individual members.

seventy-eight police officers and sergeants signed ‘representation interest cards’ allowing FOP to represent them in any capacity, let alone as plaintiffs here, inasmuch as all the other purported signatures on the cards were unauthenticated and therefore inadmissible in evidence.” Moreover, the controlling issue is not simply whether police officers authorized FOP to represent them as individuals, but whether they authorized FOP to be the exclusive representative of the whole bargaining unit. They did not. The signed representation interest cards--even if they were admissible in evidence³--on their face made no mention of any specific bargaining *unit*, but only allowed FOP to be the exclusive representative of each individual signer in collective bargaining.

If FOP is not the exclusive bargaining representative of a unit consisting of the city’s police officers and sergeants, it cannot claim that the City has violated any of its rights in that capacity, let alone the rights of the individual officers and sergeants. As shown above, neither the trial court nor this Court is an appropriate forum to determine that issue, and neither FOP nor the employees who wish for it to represent them can define the bargaining unit by themselves. *Wrinkle v. International Union of Operating Engineers, Local 2, AFL-CIO, supra*; *Parkway School District v. Parkway Association of Education, supra*. Moreover, the

³ The Court of Appeals was incorrect in stating as a fact, to support the trial court’s admission of the cards, that “most” of the City’s police officers had signed the cards in the presence of the witness James Carroll. The record does not substantiate that claim. (Tr. 46-51.)

evidence that FOP actually represents a majority of the City's police officers and sergeants in that supposed bargaining unit is legally insufficient.

(b) The Inadmissible Nature of FOP's "Card Check" Evidence. FOP's purported evidence that various police officers and sergeants may have signed FOP's "Representation Interest Cards" in 2007, and then that they and others did so again in 2009, is insufficient to prove that FOP itself--as opposed to the individual police officers--has "a legally protectable interest at stake," because FOP's witnesses only authenticated the signatures on the cards of three individual officers, none of whom is a party in this case, and the signatures and contents of all the other cards are therefore lacking in proper foundation for admission in evidence.

While FOP asserted that the "Representation Interest Cards" were its business records, they are actually hearsay, failing to comply with Sections 490.660-490.690, R.S.Mo., and not admissible in Court. *Kauffman v. Tri-State Motor Transit Company*, 28 S.W.3d 369 (Mo.App.S.D. 2000); *Kitchen v. Wilson*, 335 S.W.2d 38 (Mo. 1960). As the *Kitchen* case explains, *id.* at 43:

"Although the purpose of The Uniform Business Records as Evidence Law is to enlarge the operation of the common law rule providing for the admission of business records as an exception to the hearsay rule, the Law does not make relevant that which is not otherwise relevant, nor make all business and professional records competent evidence regardless of by whom, in what manner, or for what purpose they were compiled or offered, and when the business record is not of the character comprehended by the Uniform Law, it is

relegated to the status of hearsay and as such is not admissible in evidence.”

The pertinent contents of the “Representation Interest Cards” here are the signatures of the individual police officers and sergeants purporting to show their agreement to exclusive representation by FOP in collective bargaining. Those signatures were not prepared by FOP in the regular course of its business, but rather by the City’s employees themselves. The mere presence of the cards in FOP’s files does not render them admissible as business records of FOP. *Zundel v. Bommarito*, 778 S.W.2d 954 (Mo.App.E.D. 1989); *Hamilton Music, Inc. v. York*, 565 S.W.2d 838 (Mo.App.K.C. 1978). Seeking to introduce the cards as FOP’s business records does not eliminate the requirement of proving the authenticity of the signatures. *C & W Asset Acquisition, Inc. v. Somogyi*, 136 S.W.3d 134 (Mo.App.S.D. 2004); *McLendon v. Leighty*, 320 S.W.2d 735 (Mo.App.K.C. 1959); *Kennedy v. Boken Associates, Inc.*, 381 S.W.2d 39 (Mo.App.St. L. 1964). This is not merely a matter of the trial court’s discretion, as the Court of Appeals seems to have believed (see Slip Opinion, at page 4): even in a court-tried case, reliance on inadmissible evidence to arrive at critical findings is prejudicial error. *Washington University v. Royal Crown Bottling Company*, 801 S.W.2d 458, at 470 (Mo.App.E.D. 1990). FOP could not establish its “associational standing” or any other type of standing to sue without proving that it represents the alleged bargaining unit and its non-party police officers and sergeants for purposes of its claim for relief under Article 1, Section 29, and without the cards it had no other admissible evidence on that subject.

Although hearsay evidence is at times admissible in proceedings before the National

Labor Relations Board (NLRB)--see *Conley v. NLRB*, 520 F.3d 629 (6th Cir. 2008), and *NLRB v. B. A. Mullican Lumber and Manufacturing Company*, 535 F.3d 271 (4th Cir. 2008)--the relaxation of the hearsay rule in that administrative body is based in part on a Federal statute, 29 U.S.C. §160(b), which permits the NLRB to depart from the usual rules of evidence. No such statutory policy is applicable here. Neither Congress nor the Missouri legislature has enacted the politically controversial “card check” procedure to allow recognition of a labor union based upon a mere collection of purported employee signatures on cards, and a court certainly has no power to institute such a procedure on its own.

The trial court’s rulings on the admissibility of the cards into evidence (L.F. 39, 41) therefore were not supported by substantial evidence, and were legally incorrect. Furthermore, as noted *supra*, it should be noted that the signed “Representation Interest Cards,” even if they were admissible in evidence, purport only to give each individual signing officer’s consent for FOP to be his or her “representative and exclusive bargaining agent for the purpose of collective bargaining,” not to define the bargaining unit as a whole. FOP failed to prove its standing to litigate the issues of the case, which the trial court’s April 22, 2009, Order Denying Motion to Dismiss (L.F. 31-32) had required of it. In the absence of standing, this Court is required to vacate and reverse the judgment of the Circuit Court of St. Louis County. *Shannon v. Hines*, 21 S.W.3d 839 (Mo.App.E.D. 1999); *cf. State ex rel. Mathewson v. Board of Election Commissioners*, *supra*; *Cheatham v. Walsh*, *supra*.

III

The trial court erred in issuing mandatory relief compelling Appellant City of Chesterfield to “adopt a framework for collective bargaining,” to hold a union certification election, and to recognize Respondent FOP as the exclusive collective bargaining agent for a bargaining unit consisting of the City’s police officers and sergeants, because courts lack the power to order a municipality to do so, in that the separation of powers doctrine under Article 2, Section 1 of the Constitution of Missouri, and other binding precedent under Article 1, Section 29 of the Constitution of Missouri and elsewhere, forbid such relief.

The Applicable Standard of Review: As in Point I above, the standards of *Murphy v. Carron*, *supra*, apply on review of a court-tried case under Missouri Rule of Civil Procedure 73.01, “as in suits of an equitable nature.” The “decree or judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” However, “the nature of the appellate court’s review is directed by whether the matter contested is a question of fact or law.” Questions of law “are reviewed de novo,” although if the facts relevant to an issue are contested, “the reviewing court defers to the trial court’s assessment of the evidence.” *White v. Director of Revenue*, *supra*. Constitutional questions, including those raised by the City and presented in this Point III, are among those reviewed *de novo* as matters of law on appeal. *Id.*

The Substantive Grounds for Reversal: *Quinn v. Buchanan*, *supra*, clearly

demonstrates that the trial court had no power under Article 1, Section 29 of the Constitution of Missouri to grant the relief which its Findings of Fact, Conclusions of Law and Judgment decreed. But even more fundamentally, an order of the type FOP requested and the trial court issued in this case is erroneous because it violates the separation of powers doctrine under Article 2, Section 1 of the Constitution of Missouri, which states:

“The powers of government shall be divided into three distinct departments-- the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.”

The City of Chesterfield is not an ordinary civil litigant. It is a legislative branch entity, whose functions the courts cannot usurp by ordering it to act in a specific fashion. The judiciary is selected by a semi-political process, but it is not meant to perform merely political functions. Ordinarily, the judiciary recognizes those limitation on its authority. *See, e.g., Huttig v. City of Richmond Heights, supra; Lenette Realty & Investment Company v. City of Chesterfield, supra.* The failure of the Circuit Court of St. Louis County to do so in this case was reversible error.

The trial court, and this Court, are entitled neither to make the essentially legislative and administrative determination of the proper procedure to certify collective bargaining units and exclusive bargaining representatives, nor to order the City to institute such a

procedure in the absence of legislative authority for it to do so. *Wrinkle v. International Union of Operating Engineers, Local 2, AFL-CIO*, *supra*; *Parkway School District v. Parkway Association of Education*, *supra*. It is true that the Missouri legislature has not yet enacted an amendment to the Public Sector Labor Law, Sections 105.500-105.530, R.S.Mo., in the wake of the May 29, 2007 decision in *Independence-National Education Association v. Independence School District*, *supra*, to include municipal police among the public employees whose collective bargaining rights are administered by the State Board of Mediation. FOP has campaigned for such an amendment, as well as seeking to participate in the political process within the City to achieve its goals; and the Missouri Municipal League, of which the City is a member, has also supported the amendment. (Tr. 25-27, 30-33, 124-125.) But those facts do not create an opportunity or a justification for the courts to improvise and impose on the City and the public their own version of such legislation.

Under the separation of powers doctrine, a court may not relieve parties from the requirements of legislation as it actually exists, by “judicially legislating exceptions to its provisions.” *State ex rel. Spink v. Kemp*, 283 S.W.2d 502, at 529 (Mo. banc 1955). “It is inappropriate for a court to add provisions to a statute under the guise of construction unless such provisions are plainly written or necessarily implied.” *Bradley v. Mullenix*, 763 S.W.2d 272, at 276 (Mo.App.E.D. 1988). Even the *Independence* decision, *supra* at 223 S.W.3d 136, recognized this important limitation when it referred to the “role of the general assembly” and the local legislative body (there, the school district) to set the framework for public sector collective bargaining, rather than the courts. There can be no short cut for FOP to

obtain through litigation, or for the judiciary to order, whatever detailed items are on the FOP wish list that neither FOP, nor those individuals among the City's police officers and sergeants who may desire it to be their collective bargaining representative, have been unable to obtain through the normal political process.

“We have the duty and obligation to protect the right of the legislative department, as we would also the executive branch, to exercise those powers specifically delegated to it in the same manner as we would a similar challenge to the powers of the judiciary. Refusal to do as much would constitute an encroachment upon the legislature by this court and do violence to that separation of powers so fundamentally vital to our form of government.” *State ex inf. Danforth v. Banks*, 454 S.W.2d 498, at 500 (Mo. banc 1970). In *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, at 132 (Mo. banc 1997), the Supreme Court of Missouri cited *State ex inf. Danforth v. Banks*, *supra*, to emphasize that it has “consistently held that the doctrine of separation of powers, as set forth in Missouri’s constitution, is ‘vital to our form of government’ ... because it ‘prevent[s] the abuses that can flow from centralization of power.’”

In this case, the trial court essentially took upon itself the undelegated and unconstitutional authority to legislate for the City with regard to the unionization of the Chesterfield Police Department, and thereby exceeded the vital limits on its own judicial power. Its judgment should therefore be reversed.⁴

⁴ The Court of Appeals correctly noted that it would take legislation--the

enactment of an ordinance--for the City to create a “framework for collective bargaining” with its employees. (Slip Opinion, at page 8.) The appellate court also correctly agreed, in part, that the trial court had indeed violated the separation of powers doctrine, although its description of the error as a “directive that City designate Union as the exclusive bargaining unit” (Slip Opinion, at page 9) was inexact. What the trial court actually did was to designate the *employees required to be members* of the bargaining unit as including all of the City’s police officers and sergeants, and to order that the City bargain with FOP as the exclusive representative of all of them--which was clearly incorrect. But there was no more warrant for the other portions of the trial court’s order, which directed the City to “expeditiously establish a framework for collective bargaining which will include: ... procedures for the election process ... including the date, time, and place of election, the procedures for holding an election, and the procedures for the meet and confer process.” (L.F. 50.) The Court of Appeals’s endorsement of those equally unconstitutional, quintessentially legislative provisions ordered by the trial court was inconsistent with its other, correct holding on the separation of powers issue, and it should not be followed here.

CONCLUSION

The judgment of the Circuit Court of St. Louis County should be reversed in its entirety. As a matter of law, the City of Chesterfield is entitled to prevail on each of the issues of this appeal; and FOP is entitled to no relief of any kind on its Petition, which should be dismissed.

But it would be less than fully candid to view this case in legal terms alone. The reality is that FOP's attempt to unionize the City's police officers and sergeants has a significant non-legal, non-judicial context, beyond the record and the actual governing law. The historical period from 2007, when the Supreme Court of Missouri decided the *Independence* case, *supra*, to 2009, when FOP commenced this action, was the high-water mark of public employee unionism. That period is now over. By 2010, the electorate made clear its concern that the salaries, benefits and job security of unionized public sector employees are greater, on average, than those of workers in the private sector; that the pension obligations which governments have negotiated with their employee unions are unsustainable, and could necessitate oppressive tax burdens or even bankruptcy for state and local governments in the foreseeable future. These facts are not part of the record, and strictly speaking they are not relevant to the decision this Court will make here, but they matter.

Under all these circumstances, the trial court's decision here should properly be seen not merely as erroneous, but as an anachronism to be set aside without regret.

Respectfully submitted,

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CERTIFICATE OF RULE 84.06(c) COMPLIANCE

The undersigned counsel for Appellant hereby certifies that this brief consists of 11270 words excluding the cover, the Table of Contents and Table of Authorities, this Certificate of Compliance required by Missouri Supreme Court Rule 84.06(c), the Certificate of Service, the signature block, and the Appendix; and that it was prepared using Microsoft Word, utilizing Times New Roman font, 13-point type, in full compliance with the requirements of Missouri Supreme Court Rules 55.03 and 84.06(c).

The undersigned further certifies that the computer diskettes provided herewith to the Court and to opposing counsel have been scanned for viruses and have been found to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant hereby certifies that two true and accurate copies of the above and foregoing Appellant's Brief, together with a copy of a floppy disk containing the same, were served by first-class United States Mail, postage prepaid, this __
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